

1 are arguing to the Commission? I agree they
2 may not be happy but that is their argument.

3 MR. CARROLL: They argue that the
4 reason they would get 85 percent is they want
5 equality. They just want equal treatment.
6 That's all they want. And if equal treatment
7 meant that, fine. Or if equal treatment meant
8 that we would take our channels down to a
9 sports tier, they say, I leave it to you to
10 judge the credibility of this one, they say
11 oh, that would be fine, too.

12 Now mind you, two things about
13 that. We come back to that pitch that was
14 made to us in 2009. That is the starting
15 place for the discrimination claim, right
16 there. If you look at the pleadings, that is
17 how they based this case. They never made
18 that argument at that time. When they showed
19 up to Mr. Bond, they didn't say --

20 MS. BERGOLD: But we have to look
21 at the arguments they make to the Commission,
22 not the arguments they make to you in private

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1 negotiations.

2 MR. CARROLL: Oh, no. The
3 negotiations are the whole record evidence you
4 have to decide is discriminatory. You are
5 being asked to decide basically --

6 MS. BERGOLD: No, I mean the
7 relief they are asking for.

8 MR. CARROLL: Well okay. On the
9 discrimination act, you are being asked to
10 decide that the explanation Mr. Bond made for
11 why he decided what he did, you should reject
12 as not credible because Mr. Bond is really
13 lying and really, he was discriminating. That
14 is the essence of this case. It comes down to
15 Mr. Bond versus Mr. Solomon. And you would,
16 in essence, have to find that Mr. Bond,
17 although he said it was because of cost, and
18 although he said it was because the
19 programming really wasn't valuable enough --

20 MS. BERGOLD: Well can't you have
21 dual -- Can't you have both a legitimate cost
22 consideration and -- Is it possible to have

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1 both a discriminatory motive and a legitimate
2 cost concern?

3 MR. CARROLL: A discriminatory
4 motive and a legitimate cost concern?

5 MS. BERGOLD: Let's say --

6 MR. CARROLL: Well okay, yes.
7 Yes. Hold on. The answer to that is yes but
8 the motive has to be acted on.

9 Every vertical integrated company
10 is motivated, could have a motivation to be
11 discriminatory. Right? That is the building
12 block of their case. In theory they could
13 have that motivation.

14 The question is, did they act on
15 it and do something that was discriminatory.
16 And if what they did is make a cost decision,
17 then we know from *MASN*, because this is where
18 *MASN* is, as I read it, cost and that cost
19 benefit is what you should be doing, what else
20 should Mr. Roberts and his colleagues running
21 this company for their shareholders of America
22 and around the world who are investors in it,

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1 what else are they supposed to be doing, other
2 than running a profit-making organization and
3 looking at cost?

4 MS. BERGOLD: If you wouldn't
5 mind, can I ask you questions on a different
6 subject?

7 MR. CARROLL: Yes. Can I add one
8 thing and then I will listen to you?

9 MS. BERGOLD: Sure. Absolutely.

10 MR. CARROLL: Just, one of my
11 colleagues makes a point and it is a good one.
12 In the recent affirmance of Your Honor's
13 *Wealth TV* decision, the Commission itself
14 writes that it is critical to look at the
15 detailed negotiations between the parties and
16 how the parties defined their rights. The
17 Commission has now written that as what is
18 supposed to happen.

19 Your next question.

20 MS. BERGOLD: Okay. I'm sorry.
21 There is just a lot of different --

22 I would like to ask you some on

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1 this similarly situated.

2 MR. CARROLL: Yes.

3 MS. BERGOLD: Your argument, of
4 course, is that Tennis Channel isn't similarly
5 situated to Golf and Versus. Can you identify
6 for me any unaffiliated cable network that
7 Comcast carries on any of its systems that
8 would be similarly situated with Golf Channel?

9 MR. CARROLL: Sure, all the RSNs.

10 MS. BERGOLD: So the RSNs --

11 MR. CARROLL: Let me -- If I
12 accept their definition of what it means to be
13 similarly situated, that is, they say if it is
14 sports programming that appeals to
15 predominantly men, --

16 MS. BERGOLD: No, no, no. I'm not
17 asking you to accept their definition. I am
18 asking you what --

19 MR. CARROLL: Well, I say that
20 because I haven't done a study or had an
21 expert for me to a study of all the Regional
22 Sport Networks.

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1 MS. BERGOLD: Okay.

2 MR. CARROLL: You know what those
3 are. Okay? But they carry all the local
4 sporting teams around the country. We don't
5 own any of them but they are all out there
6 being broadly distributed. They compete with
7 us. In fact, we have some Regional Sport
8 Networks of our own that compete with the ones
9 that we are giving the same broad distribution
10 to under I think at least their version of
11 what it means to be similarly situated, they
12 would be similarly situated.

13 MS. BERGOLD: How are they
14 different from the Tennis Channel? I mean,
15 why is the Tennis Channel not similarly
16 situated and the Regional Sports Network
17 similarly situated to the Golf Channel?

18 MR. CARROLL: Well, I used his
19 definition of what similarly situated is.

20 MS. BERGOLD: No, no, no. I want
21 to know what Comcast's --

22 MR. CARROLL: I haven't analyzed

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1 them. I mean, I listened to Mr. Egan was
2 here. And was their expert, was it Mr.
3 Brooks? I've lost track of all the experts.
4 We had two experts here analyze just as
5 between tennis and Golf and Versus that
6 similarity.

7 I have not had an expert analyze
8 for me the other RSNs or for that matter the
9 Outdoor Network and the Sportsman Channel.
10 From the sounds of them and what they carry,
11 a lot of fishing and hunting activities, they
12 sound like they are in the Versus space to me.

13 MS. BERGOLD: And I asked you
14 about Golf.

15 MR. CARROLL: I know. And as to
16 Golf, I don't know. I mean, if you take their
17 broad view of a sports programming, then you
18 may be hard-pressed to say that Golf is not
19 similarly situated to the RSNs. I don't know
20 if my client would agree with that, though,
21 and I haven't analyzed the RSNs.

22 MS. BERGOLD: Okay. Well then I

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1 will ask you something about Mr. Egan's
2 testimony.

3 MR. CARROLL: Sure.

4 MS. BERGOLD: He doesn't use a
5 genre analysis, which was one of the analyses
6 he used in *Wealth TV*. He says that some of
7 the differences are that the Tennis Channel
8 predicts an international hip image; whereas,
9 the Golf Channel, it is a stayed country club
10 look. He uses the example of somebody sitting
11 before a fireplace.

12 Do subscribers really care if
13 Roger Federer is Swiss or Tiger Woods is
14 American? I mean, how does international fit
15 into this when it seems at least likely that
16 subscribers are looking at the sports events.
17 That the sports is what is motivating, not the
18 international.

19 And as far as the hip image, I
20 mean, the fact that there is a program about
21 a golf swing or a tennis serve and it is in
22 front of a fireplace or it is in a hip

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1 situation, what does the background matter?
2 I mean, how is this relevant for similarly
3 situated?

4 MR. CARROLL: Okay. My children
5 who watch a lot more TV than me say it makes
6 a huge difference. That if you have a golfer
7 in a country club doing something versus, you
8 know, some other hip internationals, I mean
9 those differences -- MTV, you know, VH1 --

10 MS. BERGOLD: Okay, how does the
11 international --

12 MR. CARROLL: No, I am not an
13 expert on this, so I am going to give you my
14 understanding.

15 MS. BERGOLD: No, but your expert
16 testified.

17 MR. CARROLL: He did and I want to
18 say a couple of things in his defense, first
19 of all. First of all, the Enforcement Bureau
20 got his name wrong in their brief, got Mr.
21 Egan's name wrong. And second, this is the
22 same Mr. Egan who was, I know, in front of

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1 this court in the *Wealth TV* matter and whose
2 testimony on look and feel was credited
3 enormously.

4 MS. BERGOLD: But that was in a
5 situation where he said there were different
6 genres.

7 MR. CARROLL: Well, he said that
8 the differences there were sufficient to
9 constitute different genres but his opinion
10 making and the expertise he was bringing and
11 the way he did it, exactly the same as he has
12 done here. If you look at the words he used
13 to describe was his *Mojo* and *Wealth TV* and how
14 they compared, he sat down, he looked at the
15 programming and he started describing what
16 kind of an atmosphere and who they were
17 appealing to and those kinds of things. It is
18 exactly what he did here.

19 Now, he can't make the point here,
20 and he didn't because he is a credible guy, he
21 is testifying honestly, he can't say they are
22 completely different genres. They are both

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1 sports here, Golf, Tennis, and you know,
2 Versus is activities.

3 MS. BERGOLD: No, but here you
4 have a situation where there is this same
5 genre and he is testifying, unlike a different
6 situation than *Wealth TV* --

7 MR. CARROLL: Right.

8 MS. BERGOLD: -- that the look and
9 feel overrides the same genre.

10 MR. CARROLL: He says that the
11 look and feel is a distinguishing feature and
12 --

13 MS. BERGOLD: That makes it not
14 similarly situated, notwithstanding the fact
15 that it is the same genre.

16 MR. CARROLL: Yes, for purposes of
17 the discrimination issue.

18 MS. BERGOLD: Yes.

19 MR. CARROLL: And that makes sense
20 to me. I will tell you why, although he was
21 here and I would invite you to read his
22 testimony. You can tell I am a little

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1 irritated about this. I will say this
2 politely. The Enforcement Bureau dismisses
3 him in a line or two as giving subjective
4 opinions. And this is the same man who they
5 endorsed and the Court endorsed for subjective
6 opinions based on programming differences in
7 Wealth TV. It is the same activity.

8 I think one needs to get inside
9 the details of the testimony, study the record
10 and see whether something makes sense. To me
11 -- I will give you -- Is this Golf I am
12 comparing to or is it Versus or both of them?

13 MS. BERGOLD: Golf. Well, start
14 with Golf.

15 MR. CARROLL: Start with Golf.
16 Okay. To me, it makes sense to me what His
17 Honor said at the beginning. Golf is
18 different than tennis. People who play one
19 don't play the other. I happen to belong to
20 a country club that only has rackets. We
21 don't have golf. I caddied when I grew up and
22 the caddy scene on the golf club was

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1 completely different than the tennis scene.

2 And Roger Federer and Rafa Nadal
3 is a rock star. He will advertise to my
4 generation, my children's generation products
5 far more successfully than anybody, any golfer
6 except maybe Tiger Woods.

7 My family and my kids could care
8 less -- Now, this isn't evidence. I am just
9 answering your question. You can cut me off
10 at any time. They could care less about what
11 heavysset golfer is up there swinging a golf
12 club. But Rafa Nadal with his cutoff sleeves
13 out there running all over the court --

14 And, in fairness, Mr. Solomon in
15 his own words has pitched this somewhat the
16 same way. In Exhibit 704, this is another
17 exhibit that I asked him about on the equity
18 for carriage notes. This is his pitch to
19 DirecTV. Listen to what he says. "This will
20 be the easiest cool move you will make." Now
21 the cool move is tennis. This is how he is
22 describing to DirecTV. This is why you should

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1 go with us. We are cool. And he talks about
2 this hotter than ever sport and its young fit,
3 and then he says, "ahem, super attractive
4 young stars." He is winking at the little sex
5 attractiveness of the stars in the tennis
6 circuit here. And he is saying it is a
7 casting director's dream. Also, do a new
8 dance by having the only major sport to
9 promote that "women love" and play equally if
10 not more than men. He is pitching it. He is
11 even using terminology like this: "Get in bed
12 at the time with a sport." These are his
13 words.

14 He would never write this about
15 golf. Nobody -- You would be a comedic
16 routine if they pointed the late night comedy
17 acts, you know Conan or one of those guys,
18 they could make a hilarious routine out of
19 taking these same words and applying them to
20 a golfer. Everybody would think that was
21 hilarious because it is not true. Golf is not
22 hip. It is not cool. And Mr. Solomon, in his

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1 own words pitches it this way.

2 Now you have to decide, I guess if
3 you get to this issue, not me, whether that is
4 enough to make a difference. And Mr. Egan
5 says it is distinguishing when it gets to
6 targeted advertisements.

7 And you know, they say there is a
8 whole lot of overlap on the advertisers. I
9 would invite you to look at the record. There
10 is not. The actual common advertisers out of
11 the top 25 was like one for one of the
12 networks and three for the other network.
13 They try to fudge over that issue by saying,
14 include not only the people that have
15 advertised with us but the people we are
16 talking to and we want to sell advertising to.
17 And then they say, see, there are a lot more.
18 And these are people they have been talking to
19 after the lawsuit. And they have criticized
20 me for having --

21 MS. BERGOLD: Is there any
22 evidence to show that their advertising people

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1 were motivated for litigation reasons? Is
2 that what you are implying?

3 MR. CARROLL: No more than there
4 is for them to make that allegation against
5 me.

6 MS. BERGOLD: No, no. I'm not
7 making that. I am asking.

8 MR. CARROLL: No, they made it, I
9 think.

10 MR. BANNISTER: Right but I am
11 asking what your allegation is.

12 MR. CARROLL: My allegation is
13 that if their view is that because Ms. Gaiski
14 thought, because they threatened it, thought
15 they might be sued, that you should discard
16 her notes as not credible.

17 If that is their position, then I
18 guess we should discard all of the activities
19 they have been engaged in since they were
20 planning to bring the lawsuit because one
21 thing is for sure. The letter, remember the
22 threatening letter Mr. Bond said he received

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1 before the meeting? Mr. Solomon didn't write
2 that letter. One of the guys at this side of
3 the table wrote this letter.

4 Now, I have never thought it was
5 fair game to say, oh we should discount
6 everything Mr. Solomon is doing because he
7 got legal advice along the way. And I think
8 it is a cheap shot for them to suggest that
9 somehow because Ms. Gaiski is finally getting
10 legal advice, too, you should disregard all
11 her checking and evidence as not credible. It
12 doesn't make any sense. That is my point.

13 I have never initiated that
14 argument. They are the ones who initiated the
15 argument. I am responding to it. I just
16 think that is not fair.

17 MS. BERGOLD: Well, it is
18 different. It may be a different type of
19 argument but are you -

20 MR. CARROLL: To put an
21 exclamation mark on this, in its opinion in
22 MASN, the FCC actually described it as the

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1 prudent thing to do in my client's situation
2 to document for litigation the discussions
3 they have about carriage. That is actually in
4 the MASN opinion. It recommends it as the
5 prudent course.

6 Somehow, I am beating a dead
7 horse, probably you want to move on to another
8 question, they are arguing that my following
9 MASN and doing a prudent course should be
10 regarded as -- should be disregarded for that
11 reason. It makes no sense.

12 And I would ask you to evaluate
13 the credibility of the witnesses based on how
14 they performed on the stand and how they
15 answered questions and not things like who
16 where their lawyers at the time and what were
17 the lawyers doing behind the scenes. That is
18 my point.

19 I can't tell whether you have
20 another one on your list or you want me to
21 finish up with anything else I have.

22 Now as you can tell, I am way out

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1 -- I am not even near my prepared copy.

2 MS. BERGOLD: Actually, I have a
3 couple --

4 JUDGE SIPPEL: You are doing all
5 right without your script.

6 (Laughter.)

7 MS. BERGOLD: I had a couple of
8 questions about the revealed preferences --

9 MR. CARROLL: Yes.

10 MS. BERGOLD: -- from Mr. Orszag's
11 testimony.

12 MR. CARROLL: Yes.

13 MS. BERGOLD: He didn't take into
14 account -- He took into account the coverage
15 of only the cable companies. Wouldn't it have
16 been more accurate to look at the coverage of
17 everybody? All of Comcast's competitors?

18 MR. CARROLL: Two answers to that.
19 First, he looks at all of them and his Exhibit
20 is 1103, I guess, and they are all listed
21 there. He doesn't ignore them. He presents
22 the evidence --

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1 MS. BERGOLD: Okay.

2 MR. CARROLL: -- and then he
3 prepared, in addition to DirecTV, Verizon,
4 Cox, they are all on that list in that
5 exhibit, he prepared one at the bottom that
6 said all cable companies, other than Comcast.

7 My understanding is that he points
8 to that and he says, if you want to look at
9 the companies that are most like Comcast, that
10 are in the cable business like Comcast, this
11 is what it would look like and we think that
12 is arguably the most instructive slice to look
13 at.

14 Here we get into now a debate over
15 well what do we do with DirecTV and Dish.
16 They have equity for carriage deals.

17 MS. BERGOLD: And not only DirecTV
18 and Dish. You have the telecoms.

19 MR. CARROLL: I am going to go
20 there.

21 MS. BERGOLD: Okay.

22 MR. CARROLL: So I will jump right

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1 to them now. I love the telecoms. I love the
2 telecoms. One of those telecoms had zero
3 distribution in 2009 when they made the pitch
4 to my client. AT&T wasn't carrying them at
5 all. Zero.

6 MS. BERGOLD: And what are they
7 doing now?

8 MR. CARROLL: In 2010 they cut a
9 deal and they took them on at 25 percent, I
10 think. But in 2009, the time of my client's
11 alleged discrimination when you are preparing
12 what is going on out there --

13 MS. BERGOLD: Well is it --

14 MR. CARROLL: Well I think fair is
15 fair. You have to look at Mr. Bond and judge
16 was he discriminating. And I think it makes
17 a difference whether everybody else was
18 already granting more distribution or were
19 other people not granting it.

20 In 2009, one of the telecoms gave
21 them zero. One of the cable companies,
22 Cablevision, had them at zero at that point.

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1 And then they had a fight over the U.S. Open.
2 It was notorious. It was in the press.
3 Tennis Channel and Cablevision and they were
4 trying to force Cablevision to carry them
5 broadly and Cablevision did a deal where they
6 signed on to the NCTC deal and carried them
7 under that contract on a more limited level.

8 But at the time, my client was
9 being pitched that you have to give us broader
10 distribution. We want D1 or D0 and it was
11 either one. AT&T gave them nothing at that
12 point in time.

13 MS. BERGOLD: Well I guess my
14 question is more generic. Does Comcast
15 believe that in making the analysis, you know,
16 should it look at just cable companies or all
17 companies?

18 MR. CARROLL: I think --

19 MS. BERGOLD: Or was it, I guess,
20 irrespective of how they did.

21 MR. CARROLL: You have Mr.
22 Orszag's testimony on this. I think from my

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1 perspective as the lawyer advocating the case
2 to you, and I am looking at both of you. I
3 don't mean to not see --

4 JUDGE SIPPEL: That's all right.
5 Go ahead.

6 MR. CARROLL: -- Your Honor. I'm
7 just trying ask the questions directly.

8 JUDGE SIPPEL: Go right ahead.

9 MR. CARROLL: I think you should
10 look at both. I think you should weigh them
11 as fact finders. I think you should look at
12 the fact that some of them are higher and ask
13 how did they get there and when did they get
14 there.

15 And I think one factor for you to
16 consider is the fact that it is interesting
17 that cable companies, my client compared to
18 other cable companies, is actually above
19 average. I don't think that as a lawyer, I am
20 not telling you that is the ending analysis,
21 though. But I think that is as legitimate a
22 way to look at it, as their way where they say

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1 well we want to include the guys that we gave
2 equity to in order to get our carriage because
3 that is not part of what they are asking for
4 now. Your Honor asked that question. They
5 are not saying, we are going to give you
6 equity now. That is not what they are
7 insisting on. They are trying to demand
8 carriage with no launch support.

9 JUDGE SIPPEL: Well in a sense,
10 are you arguing that that is part of the
11 similarly situated situation? If you are
12 trying to use apples and oranges and the
13 oranges are with other companies but they have
14 given up equity, --

15 MR. CARROLL: Right.

16 JUDGE SIPPEL: -- and you are the
17 apple because you aren't given up equity, --

18 MR. CARROLL: Correct.

19 JUDGE SIPPEL: -- you are really
20 looking at -- I think this is what, I'm not
21 sure you are getting it or whatnot -- Well let
22 me ask the question straight.

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1 Do you think that is a factor in
2 determining whether or not there are similar
3 situations?

4 MR. CARROLL: I do. I do. I
5 think it is factoring in -- it cuts in favor
6 of saying they are not similarly situated.

7 And I think you have to consider
8 all those types of factors. It can't just be
9 a generic -- Their approach is pretty much
10 generic to say here is what all the affiliates
11 are doing. All the affiliates have better
12 carriage.

13 And I want to cover one point.
14 This is one I know I want to cover before I am
15 done. And let me make this point, if I have
16 responded to your question first, Your Honor -

17 -

18 JUDGE SIPPEL: Yes, go ahead.

19 MR. CARROLL: -- which is the
20 professional leagues. This drives me crazy.
21 The evidence about how the professional
22 leagues got their equity is completely

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